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No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

OSCAR RUTSTEIN,
Petitioner

v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Whether the decision of the Court of Claims that the September 25, 1972 letter to Petitioner was final for the purpose of commencing the statute of limitations deprived Petitioner of his rights under the Administrative Procedures Act.

2. Whether the decision of the Court of Claims that the September 25, 1972 letter to Petitioner was final for the purpose of commencing the statute of limitations deprived Petitioner of his right to judicial review in violation of the Due Process Clause of the Fifth Amendment.

3. Whether the decision of the Court of Claims that the September 25, 1972 letter to Petitioner was final for the purpose of commencing the statute of limitations was inconsistent with prior rulings of that court.

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In The
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v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on April 2, 1982.

OPINION BELOW

The opinion of the United States Court of Claims appears in Petitioner's Appendix (1).

JURISDICTION

The judgment of the United States Court of Claims was entered on April 2, 1982. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1255(1).

CONSTITUTION PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

5 UNITED STATES CODE §555(e)

Ancillary Matters

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

5 UNITED STATES CODE §702

Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other then money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2)

confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 UNITED STATES CODE §706(2)(A)

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

10 UNITED STATES CODE §1552

Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and *acting through boards of civilians* of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

28 UNITED STATES CODE §2501

Time for filing suit

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

REGULATIONS INVOLVED

AIR FORCE REGULATION ("AFR") 31-3

(October 21, 1970)

Pertinent portions are excerpted as follows. The complete text of AFR 31-3 is set forth in Appendix (7):

SECTION B — APPLICATION FOR CORRECTION

8b. Denial of Application. The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice, that the applicant has not exhausted other effective administrative or legal remedies available to him, that effective relief cannot be granted, or that the applicant did not file his application within three years after he discovered the alleged error or injustice and insufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file within the prescribed three years. The Board will not deny an application on the sole ground that the record was made by or at the direction of the President or the Secretary in connection with proceedings other than proceedings of a board for correction of military or naval records. Denial of an application on the grounds of

insufficient relevant evidence to demonstrate probable material error or injustice is without prejudice to further consideration if new relevant evidence is submitted. The applicant will be informed of his privilege to submit newly discovered relevant evidence for consideration.

c. Written Findings. When an application is denied without a hearing, written findings and decisions are not required.

SECTION E — ACTION BY THE BOARD

21. Further Consideration by the Board. After final adjudication, further consideration by the Board will be granted only if the applicant presents newly discovered relevant evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary of the Air Force.

SECTION F — ACTION BY SAFOS AND THE AIR STAFF

22. Action by the Secretary of the Air Force. The record of the Board's proceedings will be forwarded to the Secretary of the Air Force who will direct such action in each case as he determines to be appropriate, which may include the return of the record to the Board for further consideration when deemed necessary.

23. Action by the Air Staff:

a. Returning Case to the Board. Upon final action by the Secretary of the Air Force, return the complete record in each case to the Board. The Board will transmit the Secretary's decision to the Chief of Staff USAF for appropriate action.

b. Communicating Decision to Applicant and Counsel. Upon receipt of proceedings after final action by the Secretary of the Air Force, the Board will communicate the decision to the applicant and counsel, if any.

AIR FORCE REGULATION 31-3,

PARAGRAPH 17(e)

(April 1, 1977)

This regulation is set forth in Appendix (9).

STATEMENT OF THE CASE

Petitioner was a commissioned officer in World War II who served as a bombardier in thirty-nine combat missions. In August, 1944, after completing 350 combat hours, as a result of his experiences, he became unfit for active service due to psychoneurosis, anxiety reaction, and was hospitalized until September, 1945, when he went on terminal leave until his discharge in December, 1945, in the grade of First Lieutenant. At the time of his discharge petitioner did not appear before a Retirement Board and was never advised of his right to do so. He was, however, given a 50% disability rating by the Veteran's Administration in 1946.

After first learning in 1971 that he was eligible for disability retirement as an officer, he applied to the Air Force Board for the Correction of Military Records (hereinafter "Correction Board") in 1972. This application was denied without a hearing, without a statement of reasons and without prejudice, on the grounds of insufficient relevant evidence. (Appendix (2)). A subsequent request for reconsideration was also denied. (Appendix (3)). In 1976, the Board finally agreed to grant him a hearing which was held in October of that year. On November 20, 1976, the Board issued a unanimous opinion that petitioner's military records should be corrected to show that on December 2, 1945, he was retired by reason of physical disability in the grade of Captain. (Appendix (5)). On December 20, 1976, the Assistant Secretary for Manpower and Reserve Affairs rejected the recommendation of the Correction Board. (Appendix (6)). A petition was filed in the Court of Claims on September 24, 1979. Jurisdiction was invoked pursuant to 28 United States Code §1346 and 28 United States Code §1491.

After the pleadings were closed, the Defendant moved for summary judgment, *inter alia*, on the ground

that the six year statute of limitations began to run on September 25, 1972, the date the Correction Board first wrote to petitioner indicating his petition had been denied. The letter is included herewith in Appendix (2) and stated in pertinent part as follows:

> I regret to advise you that a careful consideration by the Board of your military record, together with such facts as have been presented by you, fails to establish a showing of probable error or injustice in your case. However, you are privileged to submit new and material evidence for the consideration of the Board. In the absence of such additional evidence tending to show the commission of an error or unjustice, no further action on your application is contemplated.

The petitioner maintains that the foregoing letter did not constitute final action for statute of limitations purposes and that his claim for judicial review did not accrue until December 20, 1976, the date the Assistant Secretary of the Air Force for Manpower and Reserve Affairs arbitrarily and capriciously rejected the unanimous recommendation of the Correction Board. It is petitioner's claim that any finding to the contrary violates the rule of *Friedman v. United States,* 159 Ct. Cl. 1, 310 F.2d 381 (1962), *cert denied, sub nom. Lipp v. United States,* 373 U.S. 932 (1963); Air Force Regulation 31-3 (October 21, 1970) and the Due Process Clause of the Fifth Amendment.

On March 10, 1982 oral argument was presented to the Court of Claims. In an order dated April 2, 1982, the court granted the defendant's motion for summary judgment.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims holding that the September 25, 1972 letter to Petitioner was final action for statute of limitations purposes avoided without distinction the precedent set forth in *Friedman v. United States*, 159 Ct. Cl. 1, 310 F.2d 381 (1962), *cert. denied, sub nom. Lipp v. United States*, 373 U.S. 932 (1963) wherein the Court of Claims defined final action in pertinent part as follows:

> (c) A board's action (or failure to act) *is not final* if (i) *the claimant has been misled*, (ii) *the board's decision is tentative and invites reopening*, (iii) the armed service itself reopens the case, or (iv) there are other circumstances depriving the action or non-action of finality.
>
> (d) Once a final decision is had, the claim accrues, the limitations period begins to run, and there is no tolling of the statute by reason of further applications to other boards or agencies (including the Correction Board).

310 F.2d at 395 (emphasis added).

By finding against the Petitioner on the issue of the statute of limitations, the Court of Claims departed from its own usual course of judicial proceedings as set forth in *Friedman; Lipp v. United States*, 310 F.2d 674, 676 (1962) and *Denton v. United States*, 204 Ct. Cl. 188, 196 (1974); deprived Petitioner of the due process of law guaranteed him by the Fifth Amendment; and sanctioned a departure by the Air Force Board of Correction of Military Records from accepted adjudicative procedure, all of which call for an exercise of this Court's power of supervision. In addition, the Court of Claims sanctioned the use of Air Force regulations and procedures that failed to conform to the

requirements of the Administrative Procedures Act, (APA, 5 U.S.C. 555 (e)).

The important question of whether the Air Force regulations (Appendix 7) concerning applications to the Correction Board comport with the requirements of due process has not been addressed by this Court, nor has it been addressed by the lower courts. *See, e.g., Horn v. Schlesinger,* 514 F.2d 549 (8th Cir. 1975) (constitutional issues raised by not decided). *See also Mindes v. Seaman,* 453 F.2d 197 (5th Cir. 1971), where the Court of Appeals remanded to the District Court on constitutional and procedural issues. On remand, the District Court avoided the constitutional issue, stating that the plaintiff specifically waived his right to a hearing. The District Court's holding on remand was affirmed on appeal. 501 F.2d 175 (5th Cir. 1974) (per curiam).

For these reasons, discussed more fully below, Oscar Rutstein petitions this Court for a writ of certiorari to the United States Court of Claims.

I.

THE SEPTEMBER 25, 1972 LETTER TO PETITIONER, WHICH THE COURT OF CLAIMS HELD COMMENCED THE STATUTE OF LIMITATIONS, WAS DEFECTIVE IN THAT IT FAILED TO CONFORM TO THE MINIMAL PROCEDURAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURES ACT.

Section 555(e) of the APA in effect in 1972 provided that:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person

made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Pub. L. 89-554, 80 Stat. 385 (1966) (codified at 5 U.S.C. §555(e)). The letter to Petitioner (Appendix (2)), contained no explanation, findings, reasons, or grounds for the Board's decision.

The requirement that an agency issue reasons and/or findings for its decisions is important and necessary to matters of informal adjudication as well as to matters adjudicated formally on the record. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 28 L.Ed.2d 136 (1971). The *Overton Park* rationale for requiring the Secretary to articulate reasons for his discretionary decision harmonizes with arguments advanced by the commentators. 5 U.S.C. §706(2)(A) provides for judicial review of informal adjudications, and no meaningful review can be had under that section unless the reviewing court can determine on what basis the decision was made. 401 U.S. at 417, 28 L.Ed.2d at 154. A reviewing court cannot determine if an agency was arbitrary, capricious or abused its discretion by considering irrelevant factors or failing to consider relevant facts without knowing what facts and factors were relied upon by the decisionmakers. *Id.* at 416-17, 28 L.Ed.2d at 153-54. While the *Overton Park* court did not require that *formal* findings be issued in connection with the Secretary's decision, it did remand to the District Court with a provision that the lower court could require "some explanation" from the Secretary. *Id.* at 420-21, 28 L.Ed.2d at 155-56.

Commenting on *Overton Park,* Professor Davis expressed the opinion that courts would seize upon the requirement of "some explanation" because the courts

will gradually discover that a requirement of findings and reasons, when feasible, is one of the most effective protections against arbitrary exercise of discretionary power. K. Davis, *Administrative Law Text* 332 (3d ed. (1972)). See also *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (remanded for failure to articulate reasons).

Professor Davis identified five reasons compelling the requirement of reasons and/or findings. First, to facilitate judicial review; second, to prevent usurpation of the administrative function; third, to evoke care on the part of the decisionmaker by making him or her express his thoughts; fourth, to assist the parties in preparation of appeals; and fifth, to keep agencies within the scope of their jurisdiction. K. Davis, *supra* at 320-22. A dramatic illustration of the third reason is provided by the *Overton Park* case. On remand to the District Court, the District Court in turn remanded to the Secretary for reasons and findings. In the course of preparation of the findings, the Secretary reconsidered the agency's position in light of statutory criteria and the guidance of the Supreme Court and reversed the prior decision. *Citizens to Preserve Overton Park, Inc. v. Brinegar*, 459 F.2d 1212 (6th Cir. 1974) (affirming decision of District Court on remand). *See also Jacob Siegal Co. v. F.T.C.*, 327 U.S. 608, 90 L.Ed. 888 (1946) (agency reversed itself after remand for findings, *In re Jacob Siegel Co.*, 43 F.T.C. 256 (1946)).

The Air Force regulations in effect during the pendency of Petitioner's claim did not require that a statement of reasons be given for denial. AFR 31-3(B)(8)(c) (Oct. 21, 1970) (Appendix (7)), a deficiency which was in direct conflict with §555(e) of the Administrative Procedures Act. In *Roelofs v. Secretary of Air Force*, 628 F.2d 594 (D.C. Cir. 1980), the Court of Appeals remanded to the Air Force for a statement of the reasons supporting the Correction Board's denial of

the plaintiff's application to upgrade his discharge to honorable. 628 F.2d at 601. Writing for a distinguished panel, Judge Leventhal emphasized that the "requirement of §555(e) is modest. Indeed, it probably does not add to, and may even diminish, the burden put on an agency by the APA's provision for judicial review." *Id.* Writing specially, Judge Bazelon added that "neither counsel's nor the court's *post hoc* rationalizations can substitute for the agency's reasons," and that remanding was necessary to "enable meaningful review." *Id.* at 604. (Bazelon,J., concurring in the result, dissenting on other grounds). In conclusion, Judge Leventhal noted that the Air Force had agreed by consent judgment to amend its regulations to require statements of findings and reasons commencing January 1977. *Id.* at 601 & n.35 (citing *Urban Law Institute of Antioch College, Inc. v. Secretary of Defense,* No. 76-0530 (D.D.C., March 31, 1977)).

In addition, the Court of Claims itself in the case of *Lord v. United States,* Ct. Cl. No 50-80C (Order, April 24, 1981), included herewith as Appendix 8, found that the generalized and conclusory determination of the Naval Correction Board to the effect that "insufficient evidence has been presented to indicate probable material error or injustice," made it impossible for the court to decide whether or not the Board acted properly. The court, therefore, remanded the case to the Correction Board for a full hearing at which it would make "adequate detailed findings at the conclusion of its deliberations." (Appendix 8 at p. 6).

That a notice of denial communicate its finality is implied by the spirit, if not the language, of section 555(e) requiring that "[p]rompt notice shall be given of the denial ... of a written application, petition or other request." Judicial review becomes a mere illusory promise if an applicant is not put on notice that his

avenues for relief within the agency are closed and that he should inquire as to his next step.

II.

THE FINDING OF THE COURT OF CLAIMS THAT THE SEPTEMBER 25, 1972 LETTER WAS FINAL FOR PURPOSES OF THE STATUTE OF LIMITATIONS DEPRIVED PETITIONER OF HIS RIGHT TO JUDICIAL REVIEW IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Petitioner's Right to Judicial Review Was a Constitutionally Protected Interest

The right to judicial review of an administrative decision is secured to Petitioner by the provisions of 5 U.S.C. §§701-706. The existence of a right to review in the federal courts, guaranteed by statute, is a benefit which Petitioner presently enjoys and has more than a unilateral expectation for in the future. Petitioner's right to review, therefore, is an "entitlement" within the standard articulated in *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548, (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

408 U.S. at 577, 33 L.Ed.2d at 561. As emphasized by the *Roth* court, it is the *nature* and not the *weight* of the interest at stake which determines whether that interest is of Constitutional magnitude. *Id.* at 570-71, 33 L.Ed.2d at 557 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L.Ed.2d 484, 494 (1972)). Interests of a Constitutional nature and magnitude are not created by the Constitution itself, but "they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577, 33 L.Ed.2d at 561. In the case at bar, the provisions of the Administrative Procedures Act are an independent source of law which secure to Petitioner his right to judicial access to pursue his remedy. Implicit in the administration of any statutorily entitled benefit or remedy is that it not be administered in such a way as to operate as an arbitrary deprivation to specific individuals.

There is no inherent Constitutional right to judicial review or appeal, but once the state or federal government undertakes to provide the benefit of judicial review by statute, it must be administered with an even hand and within the parameters of fundamental fairness guaranteed by the Due Process Clause. To hold otherwise would signal a return to the "wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Roth*, 408 U.S. at 571, 33 L.Ed.2d at 557. As this court "made clear" in *Roth*, "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* (citing *Connell v. Higginbotham*, 403 U.S. 207, 208, 29 L.Ed.2d 418, 420). *See, also, Wolff v. McDonnell*, 418 U.S. 539, 41 L.Ed.2d 935 (1974) (once state undertakes to provide statutorily for "good time credits" inmates are entitled to fair distribution). *Compare Connecticut Board of Wardens v. Dumschat*, — U.S. —, 69 L.Ed.2d 158 (1981) (no entitlement created by

Pardons system since there were no statutorily defined criteria) *with Griffeth v. Detrich*, 603 F.2d 118 (9th Cir. 1979), *cert. denied, sub nom. Peer v. Griffeth*, 445 U.S. 970, 64 L.Ed.2d 247 (1980) (procedural due process required in the administration of applications for welfare for which eligibility criteria were mandated by statute).

What Process Is Due Petitioner In The Exercise Of His Constitutionally Protected Right To Judicial Review

The September 25, 1970 letter deemed by the Court of Claims to be "final action" for purposes of the six-year statute of limitations stated in part:

> I regret to advise you that a careful consideration by the Board of your military record, together with such facts as have been presented by you, fails to establish a showing of probable error or injustice in your case. *However, you are privileged to submit new and material evidence for the consideration of the Board.* In the absence of such additional evidence tending to show the commission of an error or injustice, no further action on your application is contemplated.

Appendix 2 (emphasis added). It is petitioner's contention that had the Board's notice been clear and unambiguous so as not to mislead him and his counsel into continuing to pursue a remedy administratively with the Correction Board, he would have filed a timely appeal in the Court of Claims. Instead, petitioner through his counsel continued to file new and material evidence, upon which the Board apparently acted and upon which the Board even granted a hearing in 1976. Not only was the letter sent to Petitioner misleading as to its contents, but nowhere in the regulations in effect at the time could petitioner's counsel obtain a definition

of what constituted final action. AFR 31-3 (Oct. 21, 1970), Appendix 7. As a result, petitioner was denied the opportunity to exercise his constitutionally and statutorily protected right to judicial review.

Paragraph 8 b of Air Force Regulation 31-3 (Appendix 7) which falls within "Section B-Application for Correction," supports petitioner's view that the 1972 and 1975 letters (Appendices 2 & 3) concerning Correction Board action on his application and request for reconsideration were misleading. It says, *inter alia:*

> Denial of an application on the grounds of insufficient relevant evidence to demonstrate probable material error or injustice is *without prejudice to further consideration* if new relevant evidence is submitted. The applicant will be informed of his privilege to submit newly discovered relevant evidence for consideration. (Emphasis added.)

This is in marked contrast to the language of Paragraph 21 of "Section E - Action by the Board" of the same regulation which says:

> 21. **Further Consideration by the Board.** After *final adjudication*, further consideration by the Board will be granted only if the applicant [sic] presents newly discovered relevant evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary of the Air Force. (Emphasis added.)

The language of Paragraph 21 was employed in the letter to Petitioner from the Correction Board dated December 30, 1976, after the Assistant Secretary disapproved its November 26, 1976, decision, while the language of Paragraph 8 b was used by the Correction

Board in the 1972 and 1975 letters. The implication, therefore, of the plain language of AFR 31-3 is that action by the Board on an application considered *without a hearing* invites reopening (Paragraph 8 b), while action by the Board and the Secretary *after a hearing* is a final adjudication (Paragraph 21). A further implication of AFR 31-3, particularly, Paragraphs 20 and 23b, under the regulations in effect during the pendency of Petitioner's application, is that a decision by the Board was *never* final until and unless it was considered by the Secretary. While the April 1, 1977, amendements to AFR 31-3 specify in SECTION E, Paragraph 17e (Appendix 9), the circumstances under which the Correction Board is authorized to take final action, the version of AFR 31-3 in effect in the relevant years (1972-1976), does not specifically indicate what constitutes final action.

To determine the type of procedures that are warranted by the Due Process Clause, this Court provided guidelines to balance the competing interests involved in *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18 (1976). The Court should balance *the government's interest*, including fiscal and administrative burdens, the *risk of erroneous deprivation* attending the lack of procedural safeguards, and the *private interest* that will be affected by the administrative or official action. 424 U.S. at 334-35, 47 L.Ed.2d at 18.

The Government's Interest. In addition to a statement of reasons (discussed in Point I, *supra*), petitioner requests only that the Air Force provide applicants with language that clearly (1) communicates the finality of the Board's decision; (2) notifies applicants that they have a right of appeal; and (3) advises the length of time within which appeals must be brought. To include a few clearly written, non-misleading sentences in a letter that is already being sent to applicants would place no

burden on the Air Force. Indeed, a communication of finality that did not invite reopening in this case would probably have resulted in an appeal in the Court of Claims directly rather than multiple requests to reconsider newly submitted evidence.

That the requested procedures resulted in a minimal burden was a principal factor in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 56 L.Ed.2d 30 (1978). Utility customers were entitled to due process because a state statute provided that electric service could be terminated only for cause. 436 U.S. at 9, 56 L.Ed2d at 39. Applying the *Mathews* criteria, the court held that the final notice to customers should include notice as to the procedure for resolving customer/utility disputes. *Id.* at 13, 56 L.Ed.2d at 41. The court stated that the "notification procedure ... was not 'reasonably calculated' to inform [petitioners] of the availability of 'an opportunity to present their objections.' " *Id.* at 14, 56 L.Ed.2d at 42. (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865 (1950)). A further comment made by the Court is equally applicable to this case:

> Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified. As no such notice was given respondents — despite "good faith efforts" on their part — they were deprived of the notice which was their due.

Memphis Light, 436 U.S. at 15, 56 L.Ed.2d at 43 (footnote omitted). *See also Goss v. Lopez*, 419 U.S. 565, 42 L.Ed.2d 725 (1975) (no burden for school system to provide student with oral notice of charges against him and allow student opportunity to respond prior to suspension action). *See also generally* Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975).

Furthermore, wooden applications of the statute of limitations in connection with informal adjudications also leave the agency unaccountable for the grossest abuses of discretion. For example, if in petitioner's case the Correction Board unanimously voted to grant him relief, once six years had passed since the original denial of his application, the Assistant Secretary could reject the findings of the Board purely on whim and never have to answer for it. Surely, this violates the spirit, if not the letter, of the Administrative Procedures Act and the Due Process Clause of the Fifth Amendment.

The Risk of Erroneous Deprivation of a Private Interest. It is because of a risk of possible erroneous or arbitrary deprivations within the realm of agency action that the right to judicial review was provided by the Administrative Procedures Act. 5 U.S.C. §§702-706. Actions that are required to be formal or "on-the-record" are subject to the "quality controls" provided by 5 U.S.C. §554 (requirements of notice and opportunity for submission of facts, arguments and proposals); §556 (form of hearing, transcripts, adjudicators, requirement of substantial evidence on whole record); and §557 (form of decision and manner of decisionmaking). None of those requirements are applicable to matters of informal or discretionary adjudication, such as petitioner's application to the Correction Board. The risk of erroneous deprivation is therefore greater in informal adjudications and the need for the "check" of judicial review more compelling. An agency that is allowed to include misleading language in boilerplate notifications sent to "thousands" of applicants, (*see* Opinion of Court of Claims, Appendix (1)), is able to foreclose judicial review, thereby making itself totally unaccountable. As Judge Bazelon stated in *Environmental Defense Fund v. Ruckleshaus*, 439 F.2d 584, (D.C. Cir. 1971), we are in an era of expanding administrative action that affects fundamental personal interests; and "[j]udicial review must operate to insure that the administrative process itself will confine and control the exercise of discretion." *Id.* at 598.

III.

THE DECISION OF THE COURT OF CLAIMS THAT THE SEPTEMBER 25, 1972 LETTER TO PETITIONER FROM THE CORRECTION BOARD WAS FINAL FOR THE PURPOSE OF COMMENCING THE STATUTE OF LIMITATIONS WAS INCONSISTENT WITH PRIOR RULINGS OF THAT COURT.

In its April 2, 1982 decision, the Court of Claims, per Skelton,J. stated that the phrase in the September 25, 1972 letter (Appendix (2)) that "... no further action on your application is contemplated," was clear enough to communicate to Petitioner that the action taken by the Correction Board was final for purposes of commencing the statute of limitations; that the clause inviting petitioner to submit new evidence was merely boilerplate; and, that based on the "1972 decision as a whole" (which consisted of three short paragraphs), it was evident the Correction Board's decision was final. In so holding, the Court of Claims chose to ignore not only the plain language of the *Friedman* case but other significant precedents which support petitioner's view.

In *Bruno v. United States*, 214 Ct. Cl. 383, 556 F.2d 1104 (1977) the Court of Claims expanded on the language of *Friedman* by saying that where the relevant board (in that case the Physical Evalution Board) suggests in its findings that the decision is tentative, or withholds a final decision pending consideration of some new evidence, or expressly *invites the petitioner to seek a reopening at some later time*, then "as a matter of law, the PEB decision is not final and the statute of limitations does not begin to run." *Id.*, 556 F.2d at 1106.

The case of *Denton v. United States*, 204 Ct. Cl. 188, 196 (1974) also supports petitioner's view of what constituted final action under AFR 31-3 as it existed

during the time period in question. There were three decisions of the Air Force Board for the Correction of Military Records involved in *Denton*. Denton's 1953 request for relief was denied by the Board without a hearing. He reapplied in 1963 at which time he was given a hearing and the relief he sought was granted and *approved by the Secretary*. The 1963 application, therefore, received final action. Denton reapplied to the Board in 1965, seeking entirely new relief which could have been requested in 1963. The Court found that the 1965 application to the Board did not deprive the 1963 decision of finality for purposes of the statute of limitations. In the instant case, plaintiff sought the *same* relief through his requests for reconsideration and there was, therefore, no "final action" until the Secretary acted in 1976.

Finally, in the case of *Lipp v. United States, supra*, 301 F.2d at 676, the relevant date for statute of limitations purposes was the last date of several on which plaintiff's request for a retiring board was denied. For this reason, and for all the foregoing reasons, it is the instant plaintiff's position that final action was not taken in this case until December 20, 1976, and it is that date from which the six year statute of limitations begins to run.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

THE PETITIONER

By A. SUSAN PECK
A Member of the Bar
of the Supreme Court
of the United States

Dated: June 21, 1982

No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

OSCAR RUTSTEIN,
Petitioner

v.

THE UNITED STATES,
Respondent

APPENDIX

APPENDIX (1)

Opinion of the United States Court of Claims
April 2, 1982

IN THE UNITED STATES COURT OF CLAIMS

No. 430-79C

OSCAR RUTSTEIN
Plaintiff

v. : Military pay; disability retirement pay; statute of limitations.

THE UNITED STATES,
Defendant : April 2, 1982

F. Mac Buckley, attorney of record for plaintiff.

Heidi Debevoise, with whom was *Acting Assistant Attorney General Stuart E. Schiffer,* for defendant.

Before *FRIEDMAN,* Chief Judge, *DAVIS,* Judge, and *SKELTON,* Senior Judge.

ORDER

This disability retirement case comes before the court on cross-motions for summary judgment. The defendant has pleaded limitations as a defense. Upon consideration of the pleadings and briefs, and after oral argument, we conclude that plaintiff's claim is barred by the six-year statute of limitations, 28 U.S.C. §2501.

The plaintiff, Oscar Rutstein, served commendably on active duty in World War II as a bombardier and participated in 39 combat missions. Upon his return to the United States in December, 1944, he underwent six months of psychiatric observation and treatment at the

conclusion of which he was discharged from the hospital and given full flying duty status. He then went on terminal leave and was discharged from the Air Force on December 2, 1945. At the time of his discharge, he did not go before a Retirement Board. However, in 1946 the Veterans Administration gave plaintiff a 50 percent disability rating, which was later reduced to 30 percent, and finally to 10 percent.

On January 20, 1972, plaintiff applied to the Air Force Board for Correction of Military Records (the Board) requesting that his record be changed to show that he was retired in 1945 with a medical disability. The Board denied plaintiff's request on September 25, 1972. Subsequently, the plaintiff filed a request for reconsideration which was denied by the Board on June 5, 1975. A second request for reconsideration was filed by the plaintiff in 1976, and, after a hearing, the Board recommended that his records be corrected to show that he was retired in 1945 with a medical disability. However, after reviewing the record, the Assistant Secretary of the Air Force disagreed with the Board and denied plaintiff relief on December 20, 1976. Plaintiff filed suit in this Court on September 24, 1979.

We do not have jurisdiction of a case which is not filed within six years after the claim first accrues. 28 U.S.C. §2501. Plaintiff's claim accrued on September 25, 1972, upon the final action by the first board competent to determine plaintiff's eligibility for disability retirement pay, which was the Air Force Board for the Correction of Military Records. *Friedman v. United States*, 159 Ct. Cl. 1, 17-19, 310 F.2d 381, 391-392 (1962), *cert. denied sub nom., Lipp v. United States*, 373 U.S. 932 (1963).

Plaintiff argues that the 1972 and 1975 decisions of the Board denying him relief, together with the existing Air Force Regulations, were merely tentative and

invited reopening of the case, or were at least misleading, due to statements in the decisions that plaintiff was free to submit new evidence for the Board's consideration. However, both decisions expressly stated that "... no further action on your application is contemplated." It is clear that the clause informing plaintiff of his right to submit new evidence is merely boiler-plate language that is included in all Board decisions as required by Air Force Regulation 31-3, Paragraph 8(b). Taking the Board's 1972 decision as a whole, it is evident that the Board's denial was final, and not tentative or conditional. Plaintiff's subsequent requests for reconsideration in 1975 and 1976 were merely permissive administrative procedures, which neither created a new cause of action nor tolled the statute of limitations. *Friedman v. United States, supra,* 159 Ct. Cl. at 25, 310 F.2d at 396; *see Eurell v. United States,* 215 Ct. Cl. 273, 566 F.2d 1146 (1977). Plaintiff's claim accrued when the Board denied his initial application on September 25, 1972, and therefore plaintiff's claim is barred by the statute of limitations.

In light of our disposition of the case, we need not consider other issues raised by the parties.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is granted, plaintiff's cross-motion for summary judgment is denied, and the petition is dismissed.

BY THE COURT

/s/ Byron Skelton
Senior Judge

April 2, 1982

APPENDIX (2)

Letter to Petitioner from the Executive Secretary of the Air Force Board for the Correction of Military Records dated September 25, 1972

DEPARTMENT OF THE AIR FORCE
WASHINGTON 20330

OFFICE OF THE ASSISTANT SECRETARY

SAFCB 72-2534

25 September 72

Dear Mr. Rutstein:

Reference is made to your request for correction of your military records under the provisions of Section 1552, Title 10, United States Code (70A Stat 116).

The administrative regulations and procedures established by the Secretary of the Air Force for the guidance of the Board provides that an application may be denied where the applicant has not submitted sufficient evidence to establish a showing of probable error or injustice in the case.

I regret to advise you that a careful consideration by the Board of your military record, together with such facts as have been presented by you, fails to establish a showing of probable error or injustice in your case. However, you are privileged to submit new and material evidence for the consideration of the Board. In the absence of such additional evidence tending to show the commission of an error or injustice, no further action on your application is contemplated.

BY DIRECTION OF THE CHAIRMAN:

M. T. MARTIN
Executive Secretary
Air Force Board for the
Correction of Military Records

Mr. Oscar Rutstein
c/o Bernard Eisenberg, Esquire
99 Pratt St
Hartford, CT.

APPENDIX (3)

Letter to Petitioner from the Executive Secretary of the Air Force Board for the Correction of Military Records dated June 5, 1975

SAPCB 72-2534 5 June 1975

Dear Mr. Rutstein:

Reference is made to your request for correction of your military records under the provisions of Section 1552, Title 10, United States Code (70A Stat 116).

The administrative regulations and procedures established by the Secretary of the Air Force for the guidance of the Board provides that an application may be denied where the applicant has not submitted sufficient evidence to establish a showing of probable error or injustice in the case.

I regret to advise you that a careful consideration by the Board of your military records, together with such facts as have been presented by you, fails to establish a showing of probable error or injustice in your case. However, you are privileged to submit new and material evidence for the consideration of the Board. In the absence of such additional evidence tending to show the commission of an error or injustice, no further action on your application is contemplated.

BY DIRECTION OF THE CHAIRMAN:

M. T. MARTIN
Executive Secretary
Air Force Board for the
Correction of Military Records

Mr. Oscar Rutstein
98 Lyman Road
West Hartford, Connecticut 06117

cc: Paul R. Harmel, Esq.
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

APPENDIX (4)

Letter to Petitioner from the Executive Secretary of the Air Force Board for the Correction of Military Records dated December 30, 1976

BAPCR 72-2534 30 December 1976

Dear Mr. Rutstein:

This refers to your application for correction of military records.

Your case has been reviewed under the provisions of Air Force Regulation 31-3 and it is the decision of the Assistant Secretary of the Air Force that your request be disapproved.

Further consideration of your case by the Board will be granted only upon the presentation of newly discovered relevant evidence not previously considered by the Board, and then only upon the recommendation of the Board and approval by the Assistant Secretary of the Air Force.

Sincerely,

[signature]
T. MARTIN
Executive Secretary
Air Force Board for the
Correction of Military Records

Enclosures
Cy of Secretarial Memo
Cy of Board Proceedings

Mr. Oscar Rutstein
98 Lyman Rd.
West Hartford, CT 06117

cc: Paul R. Harmel
1800 M. St., NW
Suite 860
Washington, D. C. 20036

APPENDIX (5)

November 20, 1976 Opinion of the Air Force Board for the Correction of Military Records

PROCEEDINGS OF THE
AIR FORCE BOARD FOR THE CORRECTION
OF MILITARY RECORDS

DATED 20 NOVEMBER 1976

I certify that the hereinafter recorded proceedings of the Air Force Board for the Correction of Military Records are a true and complete record of the proceedings of this Board in the case of OSCAR RUTSTEIN, 0694953, assigned Docket No. 72-2534.

In his application, the applicant requests, in essence, that his records be corrected to show that on 2 December 1945, he was retired by reason of physical disability.

The Air Force Board for the Correction of Military Records met in Room No. 5C968, the Pentagon Building at 0940 a.m. on Wednesday, 13 October 1976, pursuant to the call of the Chairman.

Those present were: Mr. T. W. Nelson, Panel Chairman
Mr. L. T. Baseman, Member
Mr. F. E. Mosley, Member
Mr. J. D. Pafenberg, Member
Mr. J. W. Perry, Member
Mr. W. T. Randell, Examiner

The applicant made a personal appearance before the Board, was represented by counsel, Paul R. Harmel, Esq., and Bernard Eisenberg, Esq., and presented witnesses in his behalf.

The following documentary evidence was considered and, by this reference, made a part of these proceedings:

EXHIBIT A. Applicant's request for corrective action.
EXHIBIT B. Brief of Examiner.

EXHIBIT C. Transcript of Testimony.
EXHIBIT D. Master Personnel Records of the Applicant.
EXHIBIT E. Letter from SGPC, dated 1 July 1972.
EXHIBIT F. Letter from SGPR, dated 11 July 1972.
EXHIBIT G. Letter from SGPS, dated 22 April 1975.
EXHIBIT H. Letter from SGMR, dated 10 September 1976.

THE BOARD FOUND THAT:

1. The applicant had exhausted all remedies provided by law or regulations.

2. The applicant's military records are presumed to have been destroyed by fire at the National Personnel Records Center during July 1973. The applicant's Veterans Administration (VA) Records are available. A resume of the relevant facts contained in the applicant's VA Records is set forth in the Examiner's Brief, Exhibit B, and therefore is not set forth hereinafter, and by this reference, it adopts the same as findings of fact in the case.

3. A summary of the reasons the applicant believes the record to be in error or unjust is set forth in the Examiner's Brief, Exhibit B, and therefore is not set forth hereinafter and by this reference, it adopts the same as findings of fact in the case. Cognizance was taken of the complete contents of the documents submitted by the applicant, which are marked as TAB B, the contents of which are by this reference incorporated as findings of fact in the case.

4. A summary of the pertinent facts in the case may be capsuled as follows:

a. Applicant was born 16 August 1921. He entered on active duty as a bombardier on 7 October 1943. He was involved in the following battles and campaigns: Normandy, Romo-Arno, Northern France, Southern France, Air Offensive Balkans, and Ardennes. The applicant received the following decorations and citations: Distinguished Flying Cross, Purple Heart, EAME Theater Ribbon with 6 Bronze Stars, and the Air Medal with 2 Oak Leaf Clusters. The applicant was released from active duty on 2 December 1945.

5. The applicant appeared before the Board, with counsel, and testified in his own behalf. His testimony was reiterative of the information contained in his application and supporting attachments. Applicant's and his counsel's argument before the Board is set forth in the Transcript of Testimony, Exhibit C, hereof, and was duly noted and considered by the Board in its deliberations, and without restating the complete argument at this time it incorporates the same by this reference as findings of fact in the case.

6. The applicant and his counsel indicated to the Board in pertinent part to the effect that the applicant grew up during the Depression; that he had to work after school and on weekends; that when he graduated from high school in 1939, he went to work in one of the war industries which was making tools of war for the British; that he became an apprentice tool-maker and worked at Underwood in Hartford for a couple of years; that he enlisted in 1942 and at the first opportunity applied for Officer Candidate School (OCS) as a flying officer; that he eventually was given a commission as a first lieutenant; that he was then assigned to a B-24 crew for training as a bombardier; that in the spring of 1944 his crew was ordered overseas, assigned to the 15th Air Force; that the 15th Air Force was created in November 1943, with headquarters under General Doolittle at Bari, Italy; that its function was to attack

the Ploesti Romanian oil fields which provided 60% of the crude oil for Germany and ⅓ of its fuel; that there were other targets of importance — Vienna, which had a number of oil refineries and other factories, Budapest, Southern France, and Southern Germany; that the 9th Air Force, which was stationed in Libya prior to the organization of the 15th, had attacked Ploesti in August 1943; that the 9th lost 54 B-24s and 532 airmen in that attack; that the prime objective of the 15th was to destroy Ploesti; that the 9th had damaged Ploesti, but did not destroy it; that the ground fire was tremendous at Ploesti and Vienna; that there was ferocious resistance by air fighters; that from June to August 1944, Ploesti was devastated by the 15th Air Force, but in the devastation 350 B-24s were lost; that the applicant was one of the leading bombardiers in his squadron; that there is attached to this application a letter from the pilot of the applicant's plane, a man by the name of Tuttle; that Tuttle and the applicant were sent to Italy in the spring of 1944; that the applicant participated in 39 combat missions over Ploesti, Vienna, Budapest, and other places; that Tuttle's letter indicates that on a couple of the missions they almost lost their plane on the way to Italy; that they first went to South America and then over to Africa and then to Italy; that on the trip to South America they encountered very severe storms in Georgia and Florida and almost lost the plane there; that when crossing over to Europe from South America, two of the starboard engines failed at about 3:00 a.m. one night, and the plane almost flipped over; that it did not stand on the end of the right wing and almost crashed into the ocean; that when they arrived in Africa, the crew learned that their ground crews, which had been sent over there, had been lost by submarines in the Mediterranean; that then the 39 combat missions occurred; that they went through very heavy ground fire and heavy flak; that the applicant saw many planes drop out, were destroyed, and many men killed in his squadron; that a couple of the men

were close friends; that a man from his hometown was killed; that his plane was struck in at least half of the missions; that they had 50% casualties in his squadron; that many of the members of the crew in the squadron could not continue in combat and were let out; that the applicant stuck it out for 39 times during the months of April to August, with 350 combat hours; that the average mission was eight to ten hours; that the applicant had two crash landings among the 39, which were very frightening events; that the plane was badly crippled; that they could not get back to their base; that one was after a Vienna mission; that they did not know whether they could scale the mountains, which they had to scale to get back; that finally they crash landed at Vis, an island off Yugoslavia which was held by Yugoslavian communists; that there were some British there too; that when they landed that time, the front wheel blew out; that they landed on a very short dirt runway which could not accommodate a B-24; that the other crash landing was after an attack on Southern France; that they landed at that time at Corsica; that another frightening experience was the removal of a hanging bomb in the applicant's plane; that the bomb just did not proceed downward, it hung from the bombay; that at 18,000 feet, the applicant had to get out, take off his parachute, climb out on the walk of the bombay, with the bombay doors open, and reach out to extricate the bomb that had dropped; that the final experience was in August 1944; that they had just attacked Vienna and were severely damaged; that they had to bail out over Yugoslavia; that they were afraid to jump because it was in country held by the Germans; that there were stories about what the Germans did to bombardiers particularly, atrocity stories; that it was said that sometimes they were dissected, sometimes they were torn apart, and so on; that there were stories about what happened to Jewish bombardiers who fell into the hands of the Germans; that the applicant is Jewish; that fortunately, they came down and were

found by Chetniks who were loyal Yugoslavians but who also were fighting the communist Yugoslavians as well as the Germans; that for the next 30 days they fled and hid, trying to get to a point 300 miles away where the Chetniks had a stronghold and where they could call upon an American plane to come and rescue them; that during the 30 days they ate, with the exception of three or four meals, only what they found in the fields and on the trees, the green fruit; that they had severe dysentery; that they walked and ran for 300 miles; that at times the Chetniks were attacked by the Slav communists, and they experienced the fear of that; that they were in constant fear of being discovered by the Germans; that once they were hiding in a farmhouse, and a German patrol came in that very house and were in the next room; that fleas infested their bodies; that Tuttle said that he counted a hundred flea bites around the waist of the applicant at one time; that the applicant developed a rash and scabies; that his feet were full of blisters and the holes went down to the bone; that the applicant lost weight from 178 to 150 pounds during that 30 days; that they were finally rescued and taken to Bari; that it was there that the applicant began to suffer psychoneurotic symptoms; that from that point on his sense of well being was gone forever; that the symptoms he had then and has continued to have all the way through were insomnia, restless sleep, nightmares often associated with his combat experiences, fits of depression, sudden tearing for no reason and not able to suppress it, restlessness, tenseness, excessive perspiration, particularly in the hands and feet, and extreme fatigue and weakness, plus a fear of confining places; that from the time he landed at Bari, he performed no duty whatsoever; that there is no medical record from the Bari hospital, but he did go there because he was evacuated from there; that he was examined physically and psychologically at the hospital at Bari; that from the time he arrived in the States from December 1944 he was home for a short time, and then

he came to the redistribution center in Atlantic City; that from that point on there are complete medical records; that, at the redistribution center, he was examined by a psychiatrist and a medical officer; that the same symptoms were found by the psychiatrists; that the medical officer found that he was not fit for active service and he would not recommend even a waiver; that he was then sent to another hospital at Mitchell Field; that the diagnosis of psychoneurosis due to combat experiences was made; that he was there about a month, when he was sent to the convalescent hospital at Pawling where he was through September 1945; that, in other words, from August 1944 to September 1945 he performed no duty whatsoever; that his terminal leave started in September 1945 with his release from active service on December 2, 1945; that Dr. Bacchiani, who was the doctor who treated him at the convalescent hospital at Pawling, New York, found the same symtoms that have been described, in addition to a lack of concentration to the extent that they did not attempt to rehabilitate him in classes of any kind that required mental activity; that Dr. Bacchiani found that some of these symptoms did improve over that seven month period while the applicant was at rest; that they felt he would eventually recover, so he was released to terminal leave in September 1945; that the fact is that the applicant did not recover; that as soon as he faced the stresses of civilian life, the symptoms reappeared; that the Veterans Administration (VA) assigned a 50% rating from the time of the applicant's release until 1948, then a 30% rating from 1948 to 1954, and finally a 10% rating which was based upon the obvious mistake of the man who examined the applicant, a psychiatrist, that the applicant had crying spells at school; that the VA psychiatrist had mistaken the history of crying spells at the school after his release for crying spells at school prior to his release as a young man; that one of the errors in the Surgeon General's opinion is that the applicant was returned to

full military duty from Pawling; that the applicant was not returned to full duty; that the applicant was simply sent on terminal leave to be released; that he never performed any military duty after August 1944; that he never got full flight pay as is stated in one of the Surgeon General's opinions; that the Surgeon General also relies heavily on the fact that he was promoted while he was on terminal leave, apparently arising from a misunderstanding that what he had received was what many had received after World War II or during World War II, was a terminal leave promotion that was automatically given to men who had served in grade for a certain period of time and had certain efficiency ratings and without any physical examinatin whatsoever; and that the applicant should have been retired by reason of physical disability on 2 December 1945. Due cognizance was taken by the Board of the applicant's complete testimony, which is contained in Exhibit C hereof, and by this reference the Board adopts the same as findings of fact in the case.

7. On 1 July 1972, 11 July 1972, 22 April 1975, and 10 September 1975, the Office of the Surgeon General reviewed this case and recommended that it be denied (Exhibits E-H).

THE BOARD CONCLUDES THAT:

1. Sufficient relevant evidence has been presented demonstrating that an injustice exists.

2. Through the benefit of hindsight, it is apparent that the applicant did not fully recover from his service incurred disability. This fact is substantiated by the letter from Dr. Bacchiani who said in part that it was his considered opinion that the applicant was permanently incapacitated for active military service at the time of his release from active duty in 1945 and should have been retired by reason of physical disability.

3. The applicant was unfit for military service in December 1945. The document marked Exhibit 53 provided by the applicant substantiates his claim that he was not qualified for further military service. That document informed the applicant that he could file a claim for disability benefits with the Veterans Administration. The document is dated October 2, 1945.

4. The applicant's mental condition has not improved since release from active duty. It appears that it has remained the same, or has increased in severity.

5. In view of the foregoing, the Board finds the applicant has suffered an injustice, and his records should be corrected to the extent indicated.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force, relating to OSCAR RUTSTEIN, be corrected to show that:

a. He contracted permanent disability rendering him unfit for further military service and such disability was contracted in line of duty while on active duty subsequent to 3 April 1939. The disability on which retirement is based was incurred in combat with an enemy of the United States or was the result of an instrumentality of war. The cause of such disability is: Anxiety Reaction. He was certified to the Veterans Administration, in the grade of First Lieutenant, as permanently disabled effective 2 December 1945.

b. He was assigned a compensable rating of 30% effective 1 October 1949 by authority of the Career Compensation Act of 1949.

/s/ THOMAS W.
NELSON
Panel Chairman

APPENDIX (6)

December 20, 1976 Memorandum from the Assistant Secretary of the Air Force for Manpower and Reserve Affairs for the Executive Secretary

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330

OFFICE OF THE ASSISTANT SECRETARY

DEC 1976

MEMORANDUM FOR EXECUTIVE SECRETARY, AIR FORCE BOARD FOR THE CORRECTION OF MILITARY RECORDS

SUBJECT: Oscar Rutstein, Docket No. 72-2534

I do not approve the recommendation of the Board for the Correction of Military Records in the case of Oscar Rutstein, forwarded for my approval on November 26, 1976. After reviewing the record herein, I am unpersuaded that sufficient evidence has been produced to show that an error or injustice exists in the applicant's military record.

This case was considered by the Correction Board in 1972 and, after careful consideration of the applicant's military record and his submissions, relief was denied. I have, therefore, reviewed the material herein with an eye toward determining what evidence has been propounded by the applicant to alter the Board's earlier determination. It should be added that the 1972 consideration was the first attempt by the applicant to correct the error or injustice that he alleges occurred twenty-seven years earlier.

There is no doubt that the applicant underwent severe hardships during the Second World War and I, as much as the Board, deeply regret the war-time circumstances into which the applicant was thrust. It appears that his anxiety pertaining to capture by the enemy was heightened by the fact that he is a Jew. This, and other unfortunate incidents, are clear from the record and are a sad commentary on the horrors of war.

The fact remains, however, that many thousands of American servicemen underwent similar, and even far worse, wartime experiences than the applicant. Thousands were

killed or wounded, and countless thousands more, like the applicant, returned to the United States with the imprint of war vivid in their memories. Stories of recurring loss of sleep, nightmares, and periods of depression were all too familiar to returning servicemen and their families. What the applicant asks the Air Force to do here is to reverse a determination made at the time of his discharge (which states that he had made a recovery from his fatigue and anxiety and was, at that time, fit for service) and retroactively declare that he then deserved a disability retirement.

In coming to my determination, I returned to the original decision by the psychiatrist who found that the applicant should be discharged rather than retired for disability. In February 1945, exhibiting symptoms of fatigue and strain, the applicant was treated for several months at Pawling General Hospital in New York. His primary physician was Dr. P. L. Bacchiani, Assistant Chief Neuropsychiatrist at Pawling, who spent considerable time studying the patient's condition. This diagnosis and treatment, extending over nearly eight months, even included sodium pentothal treatment to ascertain the extent of the applicant's problem. At the end of that period of convalescence and treatment, Dr. Bacchiani pronounced that the patient's confidence and security had grown and that he had recovered sufficiently to be returned to full military duty. He did not recommend disability retirement (Exhibits 24-6, 31-2).

It appears from the record that upon his discharge from the hospital, the applicant went on terminal leave, was promoted to captain, and was honorably discharged from the service on December 2, 1945. Following discharge, the applicant's condition did not preclude his normal assimilation

into society -- rather, he made what appears to be an exceptional recovery, attending and graduating from podiatry school. He began the practice of medicine in the early 1950's and his practice continues to this day.

The evidence produced in the board proceedings to refute the character of his discharge consists of statements by Dr. Bacchiani and another psychiatrist, Dr. James A. Schoettler. Dr. Bacchiani was terminally ill at the time of the Board proceedings and therefore his written statement was introduced into the record. Dr. Bacchiani now claims that had he known the applicant would manifest today some of the same behavioral traits he observed in 1945, he would have recommended disability retirement. Dr. Schoettler, a local psychiatrist, testified on the basis of a one hour interview and review of the applicant's medical records that he also believed a disability retirement was justified.

The point is that the applicant's present physiological state is not necessarily determinative of the issue of whether or not the 1945 discharge constituted an error or injustice. Mental states change over time and even if the applicant presently exhibited a debilitating psychological illness, that would not conclusively prove that he suffered from the same illness in 1945, or in the twenty-seven intervening years.

Just as there is evidence in the record indicating present manifestations of anxiety and depression, so is there evidence in the record indicating a recovery from those maladies that far exceeds the recovery made by other servicemen who were similarly discharged.

It is well known that the disability ratings of the Veterans Administration and those of the military departments are not based on identical considerations and are, therefore, often divergent. However, it is interesting to note that

the VA originally rated the applicant at 50% disability from the time of his release until 1948, dropped the rating to 30% from 1948 to 1954, and dropped it again to 10% in 1954. While military disability ratings are not necessarily related to VA ratings, it is clear that there has been a steady progression downward over the years in the applicant's VA disability ratings. This comparts with my personal evaluation of the applicant's gratifying recuperation from his wartime experiences.

Therefore, my conclusion in this case is that although the applicant may have suffered a hardship, a hardship is not an error or injustice, and without substantive evidence that the 1945 diagnosis and subsequent discharge was an error or injustice, I cannot approve the Correction Board recommendation.

Nita E. Ashcraft

Nita Ashcraft
Assistant Secretary of the Air Force
Manpower and Reserve Affairs

APPENDIX (7)

Air Force Regulation 31-3
(October 21, 1970)

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force AF REGULATION 31-3
Washington DC 20330

21 October 1970

Military Records

AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

This regulation establishes procedures for making application, and the consideration of applications, for the correction of military records by the Secretary of the Air Force acting through the Air Force Board for the Correction of Military Records (hereinafter referred to as the "Board"). This regulation applies to all Air Force activities.

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Supersedes AFR 31-3, 2 January 1962. (For summary of revised, deleted, or added material, see signature page.)

DISTRIBUTION: S
OPR: SAFCB

SECTION A—ESTABLISHMENT, FUNCTION, AND JURISDICTION OF THE BOARD

1. Legal Authority. Section 131 of the Legislative Reorganization Act of 1946 (2 U.S.C. 190g) provides that no private bill or resolution, and no amendment to any bill or resolution, authorizing or directing the correction of military or naval records, shall be received or considered in either the Senate or the House of Representatives. Section 207 of the same Act, as amended, and as re-enacted and codified in Title 10, United States Code, section 1552, provides:

"Sec. 1552. Correction of military records: claims incident thereto.

"(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

"(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

"(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary

benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

"(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by law applicable to that kind of payment;

"(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

"(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

"(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but not for longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

"(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs."

2. Establishment and Composition. Pursuant to the foregoing statutory authority, the Air Force Board for the Correction of Military Records has been established in the Office of the Secretary of the Air Force. The Board consists of civilians of the executive part of the Department of the Air Force in such number, not less than three, as may be appointed by the Secretary of the Air Force. Three members present shall constitute a quorum of the Board. The Secretary designates one member as chairman. In the absence or incapacity of the chairman an acting chairman chosen by the Board shall act as chairman for all purposes.

3. Function of Board. The function of the Board is to consider all applications properly before it to determine the existence of an error or an injustice and, when appropriate, to make recommendations to the Secretary of the Air Force.

4. Board Jurisdiction. The Board shall have jurisdiction to review and determine all matters properly brought before it, consistent with existing law.

SECTION B—APPLICATION FOR CORRECTION

5. General Requirements:

a. Submission. The application for correction should be submitted on DD Form 149, "Application for Correction of Military or Naval Record," or exact facsimile thereof, and should be addressed to:

USAFMPC/DPMDRA5
Randolph AFB TX 78148

Forms and explanatory matter may be obtained from the same activity.

b. Who Signs Application. Except as provided in c below, the application shall be signed by the person requesting corrective action with respect to his record and will either be sworn to or will contain a provision to the effect that the statements submitted

in the application are made with full knowledge of the penalty provided by law for making a false statement or claim (18 U.S.C. 287, 1001).

c. **When Person Is Unable To Submit Application Himself.** When the record in question is that of a person who is incapable of making application himself, or whose whereabouts are unknown, or when such person is deceased, for the purpose of bringing the application before the Board, the application may be made by the spouse, parent, heir, or legal representative. Proof of proper interest shall be submitted as may be required by the Board.

6. **Time Limit for Filing Application.** A claimant, his heir, or legal representative, must file the application for correction of a record with the Secretary of the Air Force within three years after discovery of the alleged error or injustice. Failure to file within the time prescribed may be excused by the Board if it finds it would be in the interest of justice to do so. If the claimant, his heir, or legal representative files an application more than three years after he discovers the error or injustice, he must include in his application his reasons why the Board should find it is in the interest of justice to excuse his failure to file the application within the time prescribed above.

7. **Other Proceedings Not Stayed.** The application to the Board for correction of a record shall not operate as a stay of any proceedings being taken with respect to the person involved.

8. **Consideration of Application.** No application will be considered until the applicant has exhausted all effective administrative remedies afforded him by existing law or regulations, and such legal remedies as the Board shall determine are practical and appropriately available to the applicant.

a. **Review.** Each application and the available military or naval records pertinent to the corrective action requested will be re-

viewed to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application without a hearing. The Board will make this determination in all cases except those in which the application has been denied administratively for the reason the applicant has not exhausted all other effective administrative remedies available to him, or for the reason the applicant did not file the application within three years after he discovered the alleged error or injustice and did not submit any reason why the Board should find it to be in the interest of justice to excuse the failure to file the application within the prescribed three years.

b. Denial of Application. The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice, that the applicant has not exhausted other effective administrative or legal remedies available to him, that effective relief cannot be granted, or that the applicant did not file his application within three years after he discovered the alleged error or injustice and insufficient evidence has been presented to warrant a finding that it would be in the interest of justice to excuse the failure to file within the prescribed three years. The Board will not deny an application on the sole ground that the record was made by or at the direction of the President or the Secretary in connection with proceedings other than proceedings of a board for correction of military or naval records. Denial of an application on the grounds of insufficient relevant evidence to demonstrate probable material error or injustice is without prejudice to further consideration if new relevant evidence is submitted. The applicant will be informed of his privilege to submit newly discovered relevant evidence for consideration.

c. Written Findings. When an application is denied without a hearing, written findings and decisions are not required.

SECTION C—ENTITLEMENT TO HEARING, NOTICE, COUNSEL, WITNESSES, AND ACCESS TO RECORDS

9. Appearing Before Board. In each case in which the Board determines that a hearing is warranted the applicant will be entitled to appear before the Board either in person or by counsel of his own selection or in person with counsel.

10. Notice of Hearing:

a. To Applicant and Counsel. In each case in which a hearing is authorized, the Board will transmit to the applicant and counsel, if any, a written notice stating the time and place of hearing. The notice will be mailed to the applicant and counsel, if any, at least 30 days prior to the date of hearing, except that an earlier date may be set where the applicant waives his right to such notice in writing.

b. To the Board. Upon receipt of notice of hearing, the applicant will notify the Board in writing at least 15 days prior to the date set for hearing as to whether he will be present at the hearing and will indicate to the Board the name of counsel, if represented by counsel, and the names of such witnesses as he may intend to call in his behalf. Cases in which the applicant notifies the Board that he does not desire to be present at the hearing will be considered in accordance with paragraph 15b.

11. Definition of Counsel. The term "counsel" will be construed to include members in good standing of the Federal bar or the bar of any State, accredited representatives of veterans' organizations recognized by the Administrator of Veterans' Affairs under Title 38, United States Code, section 3402, and such other persons who, in the opinion of the Board, are considered to be competent to present equitably and comprehensively the request of the applicant for correction, unless barred by law.

12. Witnesses at Hearing. The applicant will be permitted to present witnesses in his behalf at hearings before the Board. It will be the responsibility of the applicant to notify his witnesses and to arrange for their appearance at the time and place set for hearing.

13. Access to Records:

a. **Official Records.** The applicant shall have access to such official records as are deemed necessary to adequately present his case. It is the responsibility of the applicant to procure such evidence not contained in official records of the Department of the Air Force as he desires to present in support of his case.

b. **Classified or Privileged Matter.** Classified or privileged matter shall not be disclosed or made available without express finding of the chairman that such disclosure is required in the case and is not detrimental to the public interest. Such disclosure shall not be contrary to existing law and departmental regulations concerning privileged or classified material. When appropriate, the applicant may be supplied only with a summary or extract of classified matter.

c. **Copies of Records.** This regulation does not authorize the Board to furnish copies of official records. Requests for copies of official records should be submitted in accordance with regulations governing release of information (for example, AFR 12–30).

SECTION D—HEARING

14. Convening the Board. The Board will be convened at the call of the chairman and will recess or adjourn at his order.

15. Conduct of Hearing:

a. **By Chairman.** The hearings shall be conducted by the chairman, and shall be subject to his rulings that will be designed, insofar as practicable, to accord the applicant an opportunity to make a full and fair presentation of his case. The Board shall not be

limited by legal rules of evidence but shall maintain reasonable bounds of competency, relevancy, and materiality. AFR 11–1 is not applicable to hearings conducted by the Board.

b. **When Applicant is Not Present or Represented at Hearing.** If the applicant, after being duly notified, has indicated to the Board that he does not desire to be present or to be represented by counsel at the hearing, the Board will consider the case on the basis of all the material before it, including, but not limited to, the application for correction filed by the applicant, any documentary evidence filed in support of such appication, any brief submitted by or in behalf of the applicant, and all available pertinent records.

c. **When Applicant Fails to Appear at Time and Place Set for Hearing.** If the applicant, after being duly notified, has indicated to the Board that he will be present or be represented by counsel at the hearing, and without good cause and timely notice to the Board, he or his representative fails to appear at the time and place set for the hearing, the Board may consider the case in accordance with the provisions of b above, or will make such other disposition of the case as is indicated under the circumstances.

d. **Testimony.** All testimony before the Board shall be given under oath or affirmation. The proceedings of the Board and the testimony given before it will be recorded verbatim.

16. Continuance of Hearing. The Board may continue a hearing on its own motion. A request for continuance by or in behalf of the applicant may be granted by the Board if a continuance appears necessary to insure a full and fair hearing.

SECTION E—ACTION BY THE BOARD

17. Deliberations, Findings, Decisions, and Recommendations:

a. **Deliberations.** Only members of the Board and its staff shall be present during the deliberations of the Board.

b. **Further Information.** During the course of review of the case, when it appears to the Board's satisfaction that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before the Board, the Board may require the applicant to obtain, or the Board may obtain, such further information as it may consider essential to a complete and impartial determination of the facts and issues.

c. **Findings, Decisions, and Recommendations.** Following a hearing, the Board will make written findings, decisions, and recommendations. A majority vote of the members present on any matter before the Board will constitute the action of the Board and shall be so recorded.

d. **Separate Communication.** Where the Board considers it necessary to submit comments or recommendations to the Secretary of the Air Force as to matters arising from but not directly related to the issues of any case, such comments and recommendations shall be the subject of separate communication.

18. **Minority Report.** In case of a disagreement between members of the Board, a minority report may be submitted, either as to the findings, decision, or the recommendations or to all, including the reasons therefor.

19. **Record of Proceedings.** When the Board has completed its proceedings, a record thereof shall be prepared. Such record shall indicate whether or not a quorum was present at the hearing and at the Board's deliberations. The record shall include the application for relief, a transcript of any testimony, affidavits, papers, and documents considered by the Board, briefs and written arguments filed in the case, the findings, decision and recommendations of the Board and all other papers, documents, and reports

necessary to reflect a true and complete history of the proceedings. The record so prepared will be certified by the chairman or his designee as being true and complete.

20. Withdrawal of Application. The Board may permit an applicant to withdraw his application without prejudice at any time before its proceedings are forwarded to the Secretary of the Air Force.

21. Further Consideration by the Board. After final adjudication, further consideration by the Board will be granted only if the applicant presents newly discovered relevant evidence not previously considered by the Board and then only upon recommendation of the Board and approval by the Secretary of the Air Force.

SECTION F—ACTION BY SAFOS AND THE AIR STAFF

22. Action by the Secretary of the Air Force. The record of the Board's proceedings will be forwarded to the Secretary of the Air Force who will direct such action in each case as he determines to be appropriate, which may include the return of the record to the Board for further consideration when deemed necessary.

23. Action by the Air Staff:

a. Returning Case to the Board. Upon final action by the Secretary of the Air Force, return the complete record in each case to the Board. The Board will transmit the Secretary's decision to the Chief of Staff USAF for appropriate action.

b. Communicating Decision to Applicant and Counsel. Upon receipt of proceedings after final action by the Secretary of the Air Force, the Board will communicate the decision to the applicant and counsel, if any.

c. Informing Applicant When Administrative Action Has Been Completed. When all necessary administrative action has been

completed by the Air Staff, the applicant will be informed of such action by the Air Staff office designated by the Chief of Staff, USAF.

d. Written Notice to Chairman of Board. Written notice specifying the action taken and the date thereof will be transmitted to the chairman of the Board.

e. Filing Record of Decision of the Secretary of the Air Force. The record of the decision of the Secretary of the Air Force will not be filed in the military records of the applicant where the effect of such action would be to nullify the relief granted or in those cases wherein the application is denied.

f. Inspection of Record of Proceedings. After the Secretary of the Air Force has taken action on the record, the applicant or his counsel is entitled upon request to inspect the Record of Proceedings and to receive a copy of the Board's findings, decisions, and recommendations, unless the chairman considers that granting the request would be detrimental to the public interest.

SECTION G—SETTLEMENT OF CLAIMS

24. Authority To Settle Claims:

a. Claims Authorized to be Settled and Paid. The Department of the Air Force is authorized to pay claims in accordance with Title 10, United States Code, section 1552, which is quoted in paragraph 1.

b. Claims Not Authorized to be Paid. The Department of the Air Force is not authorized to pay any claim heretofore compensated by Congress through enactment of a private law, or to pay any amount as compensation for any benefit to which the claimant might subsequently become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

25. Application for Settlement:

a. Filing Claims. Settlement and payment of claims shall be made only upon a claim of the person whose record has been corrected

or of his legal representative, his heirs at law, or his beneficiaries. Such claim for settlement and payment may be filed as a separate part of the application for correction of the record.

b. To Whom Payments Will Be Made if Person is Deceased. In case the person whose record has been corrected is deceased, and where no demand is presented by a duly appointed legal representative of the estate, payments otherwise due shall be made to the decedent's spouse, heir or beneficiaries, in order of precedence as prescribed in Title 10, United States Code, section 1552.

c. Determining Status as Proper Parties to Claim. Upon request, the applicant or applicants shall be required to furnish requisite information to determine their status as proper parties to the claim for purposes of payment under applicable provisions of law.

26. Settlement Provisions:

a. Basis for Settlement. Settlement of claims shall be based on the decision of the Secretary of the Air Force. Computations of amounts due shall be made by the Comptroller of the Air Force, HQ USAF, or his representative, according to applicable law and regulations. In no case will the amount found due exceed the amount which would otherwise have been paid or become due had no error or injustice occurred. Earnings received from civilian employment during any period for which active duty pay and allowances are payable may be deducted from the settlement. Amounts found due may be reduced by the amount of any existing indebtedness to the Government, arising from military service.

b. Nature and Amount of Various Benefits. Prior to or at the time of payment, the person to whom payments are to be made shall be advised by the Comptroller of the Air Force, HQ USAF, or his representative, as to the nature and amount of the various benefits represented by the total settlement, and shall be advised further that acceptance of

such settlement shall constitute a complete release by the claimants involved of any claim against the United States on account of the correction of records.

27. Report of Settlement. In every case where payment is made, the amount of such payment and the name of the payee or payees shall be reported to the chairman of the Board.

SECTION H—MISCELLANEOUS

28. Staff Assistance:

a. Assembling and Transmitting Available Military Records. At the request of the Board, the appropriate staff office will assemble the original or certified copies of all available military records pertinent to the corrective action requested. Such records together with the application and all supporting papers will be transmitted to the Board with a certification from the staff office designated by the Chief of Staff, USAF, that the corrective action requested cannot be granted through administrative action by any staff office.

b. Facilities of Staff Offices. The facilities of all staff offices will be made available as required to assist the Board in accomplishing its function. Upon request of the Board, personnel of the Air Staff will be made available for presentation before the Board of matters within their functional areas and which relate to the issues under consideration.

29. Paying Expenses. No expense of any nature whatsoever voluntarily incurred by the applicant, his counsel, his witnesses, or by any other person in his behalf, will be paid by the Government.

30. Changes in Procedures. The Board may initiate recommendations for changes in procedures established herein that are considered necessary for the proper functioning of the Board. Such changes will be subject to the approval of the Secretary of the Air Force and the Secretary of Defense.

31. Publication in the Federal Register. This regulation and any amendments will be published in the Federal Register.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

JOHN F. RASH, *Colonel, USAF*
Director of Administration

JOHN D. RYAN, *General, USAF*
Chief of Staff

Summary of Revised, Deleted, or Added Material

This revision clarifies that recommendations are not made to the secretary in each and every case (para 3); conforms to the literal wording of Section 1552(b), Title 10, United States Code (para 5c); provides that written findings and decisions are not required when applications are denied without a hearing (para 8c); hearings are granted at the discretion of the Board (para 8a); conditions for release of classified material (para 13b); release of official records is not authorized by this regulation (para 13c); procedures applicable to boards of officers are not applicable to hearings by the Board (para 15a); and provides for deduction from earnings in civil employment in the settlement of claims (para 26).

APPENDIX (8)

Lord v. United States, Ct. Cl.
No. 50-80C (Order, April 24, 1981)

IN THE UNITED STATES COURT OF CLAIMS

No. 50-80C

WILLIAM H. LORD	: Military pay; claim for disability retirement; conclusory Correction Board determinations; court's inability to determine bases of Correction Board's action; remand to Navy for hearing and redetermination.
v.	
THE UNITED STATES	

APRIL 24, 1981

Robert N. Jensen, attorney of record, for plaintiff. *Ralph A. Simmons, Nancy M. Stiles* and *Peabody, Rivlin, Lambert & Meyers*, for plaintiff.

Robert E. Richardson, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant. *Eric J. Barnett*, of counsel.

Before DAVIS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

ORDER

This is a suit by a former Navy officer for disability retirement pay. It comes before us on cross-motions for summary judgment. Oral argument has been had and we have also considered the written submissions. We decide that we must remand the case for a full hearing and redetermination.

This much appears clearly from the present record: — Plaintiff, a medical doctor, served on active duty as a Lieutenant Commander of the Navy medical corps from May 1, 1966 through April 30, 1968, when he was discharged honorably (at the end of his term of service), without entitlement to disability retirement. Some five months previously (November 1967), he suffered injuries from a fall while riding a horse, and was treated for those injuries. The Navy doctors considered his injuries to be only trauma and muscle contusions of the abdominal wall; it appears that during his remaining five months on active service Dr. Lord had (and sought Naval medical help for) back, flank and leg pains, had difficulty voiding, and developed a urinary tract infection. At a physical examination shortly before discharge (apparently in connection with a hernia operation) he was pronounced in good physical and mental health. He did not have or apparently ask for a Physical Evaluation Board at that time.

Some time later, plaintiff began to suspect strongly that his injuries were more serious, and from that time on he consulted several doctors, underwent further tests, and had an operation. He has presented to us a considerable body of medical materials (in the form of medical reports, affidavits, and statements) showing that when he was thrown from the horse in November 1967 he suffered, not merely trauma and injury to the abdominal wall, but a compression fracture of a spinal vertebra, leading to serious and chronic neurological bladder and other difficulties through injury of peripheral nerves. He applied for Veterans Administration benefits in January 1972 and received a service-connected disability rating of 70%; this was later raised to 80%. Plaintiff claims that a Department of Defense directive includes his condition as one normally rendering a service member physically unfit for further duty.

In March or April 1974 plaintiff applied to the Board for Correction of Naval records for a determination that he should have been retired for physical disability.[1] After receiving generalized and conclusory determinations adverse to plaintiff from the Central Physical Evaluation Board, the Physical Review Council, and the Naval Physical Disability Board, the Correction Board refused (in May 1975), without a hearing, to correct Dr. Lord's records to show entitlement to disability retirement. The Board's letter to plaintiff is wholly general and without any specific findings or detail, saying no more than that "insufficient evidence has been presented to indicate probable material error or injustice." Plaintiff's requests for reconsideration by the Board were unavailing (no hearing was held). The Board letter to plaintiff of October 27, 1977 was hardly more informative than the earlier ones. The only matter of any substance which was added was the general statement that "Cases such as yours, where conditions are traceable to active military service, are appropriately adjudicated by the Veterans Administration as that agency is not bound to the requirement of finding an individual to be unfit for military service before awarding disability benefits."

We are wholly unable to decide whether the Correction Board (and the other naval boards it consulted) (a) determined that, despite plaintiff's strong showing in support of a more serious injury, the original naval diagnosis of trauma and injury to the abdominal wall was upheld, and such injury would not be unfitting for service, or (b) whether it was determined that plaintiff did in fact suffer the more serious compression fracture of a vertebra with peripheral nerve injury but that such injury was not sufficient in the circumstances to be

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[1]Our understanding is that plaintiff supplied to the Correction Board practically all the medical statements and reports which have been presented to us.

disabling when he was discharged in 1968.[2] Moreover, the Correction Board's formal and conclusory determinations do not give us any satisfactory assurance, in the light of the strength of the materials plaintiff has presented, that the Board properly considered this case in the light of all the standards properly governing this case.

In this connection, we cannot decide whether (as plaintiff specifically contends) the Correction Board relied on certain provisions of Department of Defense memoranda relating to special review of disability retirements for medical corps officers; imposing on servicemen being processed for separation for reasons other than physical disability "a presumption that the member is fit for duty" arising from "his continued performance of duty until he is scheduled for separation for [such] other purposes"; and that "[w]hen the member's referral for physical evaluation is related to physical examinations given as a part of non-disability retirement processing, evidence must be clear and convincing to overcome the presumption of fitness," while in other cases the presumption of fitness may be overcome by a "preponderance of the evidence." The Defense directive as to non-disability separations was questioned in our recent order in *Davidson v. United States*, Ct. Cl. No. 518-77, issued February 29, 1980, seeking further information on its standards, and we have similar problems if the directives were considered by the Correction Board to be applicable to this plaintiff's case.

In this situation, we can give very little weight to the Correction Board's past determinations and

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[2]Plaintiff was not examined by Navy physicians in connection with his Correction Board applications, nor has he been examined by Navy doctors since his release from active duty in April 1968. He did not appear personally before any of the Navy boards which considered his requests to the Correction Board.

therefore cannot grant defendant's motion for summary judgment which relies almost entirely on the Board's conclusory rulings (and does not otherwise contest Dr. Lord's medical presentation).

We are likewise unwilling to grant plaintiff's cross-motion for summary judgment in the absence of more proof that plaintiff's asserted injuries, assuming as we must on the present record that those injuries existed in 1968, rendered him unfit for duty at that time. Such injuries might well be sufficiently disabling even if not recognized at the time (*cf. Harper v. United States*, 159 Ct. Cl. 135, 310 F.2d 405 (1962); *Walters v. United States*, 175 Ct. Cl. 215, 224-28, 358 F.2d 957, 962-64 (1966); *Farrar v. United States*, 173 Ct. Cl. 1008, 358 F.2d 965 (1965), and cases cited), but it could also be that this was not so. *See, e.g., Stone v. United States*, 160 Ct. Cl. 128 (1963). The materials now before us are not enough for a proper decision. A fuller ventilation of the problem is necessary to determine the question.

Plaintiff has expressly asked that, if we find (as we do) a full trial or hearing to be necessary, we remand to the Navy Correction Board rather than remand to our Trial Division. We accede in this instance to the claimant's request without indicating in any way that a remand to the Trial Division would be incorrect or inappropriate, and without establishing any practice or precedent for comparable cases in which a full trial or hearing is necessary but in which the claimant has not asked for a remand to the Correction Board (or to a military department).

On remand, the Navy Correction Board will grant a full hearing to plaintiff of the kind it proffers in those instances in which it decides to hold a full hearing, but the Board will not unnecessarily require the actual presence of the witnesses whom plaintiff does not desire to call if the Board is satisfied with the witnesses' affidavits, statements, or reports without need for

personal appearance. The Board will make adequately detailed findings at the conclusion of its deliberations.

If the Board relies, on remand, upon the standards set forth in the directive issued by the Secretary of Defense in January 1973 (discussed above and in *Davidson v. United States, supra),* the Board should answer the following questions:

1. Whether, absent the Secretary of Defense's directive and its implementation by the Navy, the Correction Board would still deem plaintiff to have been fit for duty at the time of his separation.

2. What is the distinction in this case between "preponderance" of the evidence and "clear and convincing" evidence.

If the Board does rely on or use those standards in the Defense directive, the court would also appreciate (but does not require) any discussion the Board sees fit to include as to the justification for erecting more rigid standards of proof of medical unfitness in the case of persons like plaintiff being separated at the conclusion of their service.

It is therefore ordered that the cross-motions for summary judgment are both denied and the case is remanded to the Board for Correction of Naval Records for further proceedings pursuant to this order. Proceedings in this court are meanwhile stayed for a period of six months. See Rule 149. Counsel for plaintiff is designated under Rule 149(f) to advise the court by letter to the trial judge to whom this case is assigned of the status of proceedings on remand. See also Rule 150.

BY THE COURT

/s/ Oscar H. Davis
Judge

April 24, 1981

APPENDIX (9)

Air Force Regulation 31-3,
paragraph 17(e) (April 1, 1977)

SECTION E — ACTION BY THE BOARD

17. Deliberations, Findings, Decisions, and Recommendations:

a. Deliberations. Only members of the Board and its staff shall be present during the deliberations of the Board.

b. Further Information. During the course of review of the case, when it appears to the Board's satisfaction that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before the Board, the Board may require the applicant to obtain, or the Board may obtain, such further information as it may consider essential to a complete and impartial determination of the facts and issues.

c. Findings, Decisions, and Recommendations. Following a hearing, the Board will make written findings, decisions, and recommendations. A majority vote of the members present on any matter before the Board will constitute the action of the Board and shall be so recorded.

d. Separate Communication. Where the Board considers it necessary to submit comments or recommendations to the Secretary of the Air Force as to matters arising from but not directly related to the issues of any case. Such comments and recommendations shall be the subject of separate communication.

e. Delegation of Authority to Correct Certain Military Records:

(1) The Air Force Board for the Correction of Military Records is authorized to take final action on behalf of the Secretary of the Air Force, under 10 U.S.C. 1552, in approving the correction of military records,

provided such action (a) has been recommended by the Air Staff; (b) is agreed to by the Board; and (c) falls into one of the following categories:

(a) Restoration of leave unduly charged to applicants.

(b) Promotion of applicants retroactively, who would have been promoted during regular promotion cycles but were inadvertently or improperly excluded from consideration during such cycles; and adjustment of their pay accounts accordingly.

(c) Promotion of applicants to grades held immediately before reenlistment who were inadvertently or improperly reenlisted in a lower grade.

(d) Awards of basic allowance for subsistence to applicants entitled thereto.

(e) Authorizing participation, declination, or modification of an election under the Retired Serviceman's Family Protection Plan and/or the Survivor Benefit Plan where failure to elect to participate, decline to participate, or to make an appropriate election was due to inadvertence, misunderstanding or through no fault of the service member.

(f) Placement in a temporary or permanent disability retired status, including appropriate percentage of disability, of applicants who were clearly physically unfit and were inadvertently or improperly separated.

(g) Award of variable reenlistment bonus, proficiency pay, enlistment and/or reenlistment bonus to applicants clearly entitled thereto.

(h) Change of home of record where upon entry on duty applicants erroneously reported other than actual home.

(i) Award of Reserve participation credit in computation of years of satisfactory service where such service was improperly or erroneously credited.

(2) The Executive Secretary of the Board, after assuring compliance with the above conditions, will announce the final action on applications processed under this subparagraph.